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No. 02-527

In the Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ET AL., PETITIONERS

v.

JOE ALLBAUGH, DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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In their supplemental brief, petitioners assert (at 1) that the Ohio Supreme Court's recent decision in *Ohio State Building & Construction Trades Council* v. *Cuyahoga County Board of Commissioners*, No. 2001-2036 (Dec. 27, 2002) (Supp. Br. App. 1sa-36sa), "conflict[s]" with the District of Columbia Circuit's decision in this case. Contrary to petitioners' suggestion, the two decisions do not conflict. Nor does the Ohio Supreme Court's reasoning in *Cuyahoga County* undermine the validity of the presidential Executive Order at issue in this case.

This case involves a challenge to an Executive Order issued by the President of the United States. The Ex-

ecutive Order directs federal agencies, "[t]o the extent permitted by law," to ensure that bid specifications for federal and federally funded construction contracts neither require contractors to enter into project labor agreements (PLAs) with unions nor prohibit contractors from doing so. Pet. App. 74a-75a. The *Cuyahoga County* case involves a challenge to a state statute that directs all "public authorit[ies]" in the State to ensure that the bid specifications for their construction contracts do not "require a contractor or subcontractor" to enter into a PLA for the project. Supp. Br. App. 11sa-12sa (quoting statute).

The Ohio Supreme Court did not dispute that the State would engage in proprietary activity, which is not subject to preemption analysis under the National Labor Relations Act (NLRA), if it decided on a project-by-project basis not to require PLAs on its own construction contracts. The court nonetheless reasoned that the same sort of decision is a regulatory one, and thus is subject to NLRA preemption analysis, when the State makes it on an "across-the-board" basis. Supp. Br. App. 33sa. As the court of appeals recognized in this case, such a distinction has "no logical justification." Pet. App. 12a.[1]

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[1] The Ohio Supreme Court extensively relied (Supp. Br. App. 26sa-28sa) on dicta in *Chamber of Commerce* v. *Reich*, 74 F.3d 1322, 1337 (D.C. Cir. 1996), suggesting that the first President Bush had not acted in a proprietary capacity in issuing an earlier Executive Order involving PLAs that applied "across-the-board." As the D.C. Circuit explained in this case, such reliance "misread[s]" *Chamber of Commerce*, which held that the Executive Order of President Clinton that was at issue in that case "was regulatory not because it decreed a policy of general application, as opposed to a case-by-case regime, but because it disqualified companies from contracting with the Government on the basis of con-

Even if, however, the Ohio Supreme Court were correct in concluding that the preemption doctrines under the NLRA require *a state or local government* to make proprietary decisions on its own construction projects on a project-by-project basis, it would not follow that the quite different principles governing the validity of actions of *the President of the United States* require that he do so as well. As previously explained (Gov't Br. in Opp. 13), the President is vested with authority under a separate Act of Congress—the Federal Property and Administrative Services Act of 1949 (Procurement Act), 41 U.S.C. 251 *et seq.*—to establish policies on proprietary matters for the United States government. The President has also been vested with authority under Article II of the Constitution to supervise the officers of the Executive Branch in performing their duties under the various laws, including those governing grants, that they are charged with administering. See Pet. App. 6a-7a. The question in this case therefore turns on the accommodation of the different sources of authority under *federal* law—the vesting of regulatory authority in the National Labor Relations Board under the NLRA and the vesting of authority in the President under the Constitution and the Procurement Act. Those different grants of authority must be read harmoniously, if possible. See generally *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528, 534 (1995). NLRA preemption, by contrast, involves restraints on the regulatory actions of state and local governments by operation of the Supremacy

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duct unrelated to any work they were doing for the Government." Pet. App. 12a. The court observed that the Executive Order at issue here, in contrast, "extends only to work on projects funded by the government." *Id.* at 13a.

Clause. See *Lodge 76, Int'l Ass'n of Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976) (*Machinists*). It is thus untenable to view *Machinists* preemption under the NLRA as constraining the President's ability to act on an "across-the-board" basis to establish policies for the Executive Branch with respect to the efficient and effective use of federal funds. See Gov't Br. in Opp. 13-14, 15-16.

Aside from the central distinction that the Executive Order in this case is the action of the President whereas the Ohio statute in *Cuyahoga County* is the action of a state government, there are other distinctions between the Executive Order and the statute as well. For example, as the court of appeals recognized in this case, the Executive Order is designed "to ensure the most effective use of [the government's] funds." Pet. App. 11a; see *id.* at 74a (reciting that the Executive Order is designed to "promot[e] the economical, nondiscriminatory, and efficient administration and completion of Federal and federally funded or assisted construction projects"). The court of appeals thus understood that the President was acting out of the same proprietary concerns as would private project owners, contractors, or lenders in deciding whether to use PLAs.

In contrast, the Ohio Supreme Court perceived the statute in *Cuyahoga County* as designed not as a means of ensuring efficient procurement, but instead as an instrument of "labor policy," Supp. Br. App. 33sa, designed to "prohibit so-called 'project labor agreements' in the State of Ohio," *id.* at 12sa-13sa (quoting statement of sponsor). See *id.* at 33sa (quoting preamble to bill enacting statute) (purpose is "to prohibit public authorities from imposing certain labor requirements"). It is significant in this regard that the Ohio statute is not, by its terms, confined to construction contracts

receiving state funds. See *Ohio State Bldg. & Constr. Trades Council* v. *Cuyahoga County Bd. of Comm'rs*, Nos. 77242 & 77262, 2001 WL 1152900, at *12 (Ohio Ct. App. Sept. 27, 2001) (Rocco, J., concurring in part and dissenting in part) (noting that the statute "regulates not only the state itself as a purchaser but almost every governmental entity in the state and, more tellingly 'any institution supported in whole or in part by public funds'") (quoting Ohio Rev. Code Ann. § 4116.01(A) (Anderson 2001) (defining "public authority")). The *Cuyahoga County* case thus involved a statute whose text and purpose were quite different from the text and purpose of the Executive Order issued by the President in the exercise of his proprietary authority.

Moreover, the Executive Order provides that federal agencies and federal fund recipients are not to "[r]equire *or prohibit* bidders, offerors, contractors or subcontractors to enter into or adhere to" PLAs on federal and federally funded construction projects. Pet. App. 74a (emphasis added); see *id.* at 75a. The Executive Order thereby "maintain[s] Government neutrality toward Government contractors' labor relations" on such projects. *Id.* at 74a. The Ohio statute, in contrast, provides only that public authorities cannot "require a contractor or subcontractor" to enter into a PLA, Supp. Br. App. 11sa, and thus, unlike the Executive Order, allows public authorities to prohibit contractors or subcontractors from doing so.

In sum, because the Executive Order of the President in this case differs in significant respects from the state statute in *Cuyahoga County*—and because the governing legal principles in the two cases have fundamentally different groundings in the Constitution—the Ohio Supreme Court's decision does not conflict with the court of appeals' conclusion that the President acted

in a proprietary capacity in issuing the Executive Order or cast doubt upon the validity of the President's action in doing so.

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For the reasons stated above and in the government's brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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